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Supreme Court of the United States

No. 286

UNITED STATES OF AMERICA,
Appellant,

against

DIEBOLD, INCORPORATED,
Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF OF MOSLER SAFE COMPANY IN OPPOSITION TO APPELLEE'S MOTION TO UNSEAL SEALED PAPERS

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Appellee, Diebold, Incorporated (Diebold) has moved this Court by notice dated November 30, 1961, for an order "authorizing and directing the Clerk of this Court to unseal and make part of the open record on appeal, available for use in the printed record if so designated by the parties, the affidavit of Albert Neisser, filed in the District Court on March 1, 1961, and all attachments thereto."

The affidavit of Albert Neisser referred to in Diebold's motion was filed on behalf of the plaintiff United States in this action and was ordered sealed by the trial court on motion of the Mosler Safe Company (Mosler) on the ground that the affidavit contained and disclosed extremely valuable trade secret information concerning Mosler which had been obtained by agents of the plaintiff from the original income tax returns filed by Mosler. The Neisser affidavit even went so far as to annex a photocopy of Mosler's 1959 income tax return.

The Mosler Safe Company is, of course, not a party in this action, and is not associated with the defendant Diebold. Instead, quite to the contrary, Mosler is actively engaged in competition against the defendant Diebold.

No showing of any necessity for the public disclosure of Mosler's income tax returns and other confidential financial information has ever been made by either of the parties to this litigation.

Argument

The brief of the defendant Diebold on the present motion fails completely to demonstrate any necessity or requirement on this appeal for this disclosure of Mosler's confidential income tax returns and other intimate trade and business secrets to its major competitor, Diebold.

None of the cases cited by Diebold at pages 4 and 5 of its brief involves situations which are at all comparable to the present situation.

Neither the case of *Service Liquor Distributors* v. *Calvert Distributors Corp.*, 16 FRD 507, 509 (SDNY 1954), ner the case of *H. P. Hood & Sons Inc.*, FTC Dkt. 7709, CCH Trade Reg. Rep. ¶29,461 (Transfer Binder 1960-61), involves in any way an attempt to force the disclosure of confidential income tax returns or other trade secret information belonging to a mere witness or other third person or corporation which is not a party to the litigation; both of the cited cases deal only with the necessary disclosure of information belonging to an actual party to the litigation.

The "Publicity in Taking Evidence Act" (15 USC §30) cited by the appellee Diebold is concerned solely with procedure in the taking of depositions and is obviously inapplicable to the disclosure of Mosler's confidential income tax returns sought by Diebold on this motion. Similarly, the case of *U. S.* v. *Procter & Gamble Co.*, 356 U. S. 677, 683 (1958) is concerned solely with preserving the traditional secrecy of grand jury minutes and does not support Diebold's present motion in any respect.

Judge Kaufman's ruling in *U. S.* v. *Lever Bros. Co and Monsanto Chemical Co.*, 193 F. Supp. 254 (SDNY 1961) bears only a superficial resemblance to the present case, and is neither applicable nor controlling in the present situation. The basic market information sought by Lever Bros. from its competitors Procter & Gamble and Colgate had already been disclosed by them to the plaintiff in the action, and this information was expressly found by the court to be absolutely essential to a determination on the merits of the crucial isses of "delineation of the relevant market and the determination of whether the sale of assets

in question may result in the requisite substantial lessening of competition" (195 F. Supp. at 256).

There is obviously no such necessity for the disclosure of Mosler's confidential financial data in the present case in order to reach a decision on the merits of this appeal, since the decision of the District Court in this case was expressly limited solely to a finding that the acquired company, Herring-Hall-Marvin Safe Company (HHM), was a "failing company" within the meaning of *International Shoe* v. *U. S.*, 280 U. S. 291 (1930).

Under these circumstances, it is abundantly clear that there is no necessity whatsoever for requiring the disclosure of Mosler's confidential income tax returns to its chief competitor Diebold.

It should furthermore be noted that even in the *Lever Bros.* case referred to above, Judge Kaufman expressly ruled that a protective order should be entered with respect to the information which was required for that case:

> "While I, therefore, hold that Lever is entitled to full discovery, this privilege should in fairness to all concerned be exercised in a manner which will not hamper its ability to prepare its defense, and at the same time will operate to discourage any improper and unfair use of the material to be produced. I am of the opinion that in the context of this case, a proper protective order can be framed to accomplish these objectives. Thus, while I conclude that Procter is not entitled to the rigid type of protection it seeks, *in order to assure* that *Lever will not use this data for an improper competitive purpose, the information is not to be disclosed*

to Lever's personnel, except insofar as it may be necessary for consultation with counsel for Lever in order to prepare for and assist in the defense of the action. Any such personnel obtaining access to the information for this purpose shall not make copies, or reveal the contents of the documents, or use the information for any purpose other than for the preparation and defense of this action. Of course, at this stage, *none of this data*, including the information contained in the reports made by the A. C. Nielsen Co., *is to be disclosed to the public.*" (195 F. Supp. at 258; emphasis added.)

Similarly, Sections 6103 and 7213 of the Internal Revenue Code and Treasury Regulation Section 301.6103 make it crystal clear that confidential income tax returns can be disclosed or made public in only the most exceptional cases. Thus, Treasury Regulation Section 301.6103(h) provides in pertinent part:

"* * * The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. * * * If a return, or copy thereof, is furnished pursuant to this paragraph, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity *necessarily* results from such use. * * *" (Emphasis added.)

As previously noted, no showing of any necessity for the public disclosure of Mosler's income tax returns and other confidential financial information has ever been made by either of the parties to this litigation.

A protective order was also entered by Judge Bicks in the *Service Liquor Distributors* v. *Calvert Distributors Corp.* litigation, 16 FRD 513, 514 (SDNY 1955), even though the plaintiff was seeking to inspect the books of one of the defendants in the action.

The appellee Diebold's present motion is also clearly premature since Diebold itself does not purport to rely in any way on this appeal upon the appellant's Neisser affidavit or upon any of the data contained therein, and similarly, the Solicitor General has indicated that it also may very well be unnecessary for the United States to rely upon the portions of the Neisser affidavit which disclose Mosler's trade secret information. Thus, the Memorandum for the United States on this motion states in pertinent part that:

> "• • • at this posture of the case, when counsel for the parties are designating the record for printing—and before the arguments in this Court have been fully projected—*no one knows with certainty whether or not it will be necessary to rely on all those portions of the sealed papers which the Mosler Safe Company has wished to keep from public disclosure.*" (Emphasis added.)

The extremely limited nature of the use which was made in the Neisser affidavit of the confidential information taken from Mosler's income tax returns is succinctly illustrated by the following quotation from the appellant's Jurisdictional Statement filed August 4, 1961 (at pp. 10-11):

> "Based on an examination of the federal income tax returns of the three major companies in the field (HHM, Diebold and the Mosler Safe Company) for the five-year period preceding the merger, a government

> economist compared their financial strength and operating performance. Applying criteria customarily used by accountants and economists (such as the relationship between net income and net sales, net income and net worth, net sales and working capital, net sales and inventory, etc.), he concluded that HHM, compared to the other two companies, was in sound financial condition and made effective use of its financial resources."

In this respect, it should be noted that the government economist (Neisser) also made similar comparisons utilizing published financial information of publicly owned companies such as Continental Can, American Radiator & Standard Sanitary, Gillette Co., Murray Corporation of America, Crane and Briggs "which are included in the 'industry' according to Lybrand" (Plaintiff's Memorandum in District Court). Obviously the comparisons between HHM and these publicly-owned companies, plus the comparison of HHM with Diebold itself, are completely adequate for the plaintiff's purposes on the appeal. Any comparison utilizing privately-owned Mosler's confidential tax returns is clearly unnecessary and would at most be merely cumulative.

Mosler has, of course, no objection to unsealing those portions of the Neisser affidavit which do not reveal information taken from Mosler's confidential income tax returns.

Similarly, Mosler does not object to any use which may be made of the sales figures which Mosler has made available to the parties during its examination before trial as a witness in this case.

It would indeed be ironic if the defendant Diebold's acquisition of HHM, which the United States has alleged:

> "will enhance Diebold's competitive advantage over smaller producers to the detriment of competition"
>
> and will
>
> "tend to create a monopoly" [Complaint ¶11]

should also have the practical outcome as a result of the government's Complaint and of the present motion, of permitting Diebold to acquire the further important competitive advantage of examining and studying the confidential business and financial records and trade secrets of the only remaining "smaller producer"—Mosler.

Conclusion

For the reasons set forth above, Diebold's Motion to unseal the sealed papers in question, and to make them part of the open record in this cause fully available for printing as part of the printed record if so designated by the parties, should be denied insofar as the said Motion relates to the confidential income tax returns of Mosler Safe Company and to information taken from the confidential income tax returns of Mosler Safe Company. Mosler is, however, willing to cooperate fully with the Solicitor General and with counsel for Diebold with respect to any necessary use by counsel—upon as limited a basis as is practical—of such

information as may actually be necessary for the presentation or defense of the appeal in this case.

December 15, 1961.

Respectfully submitted,

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